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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. **75-1182**

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, *Petitioner,*

v.

ROBERT FRANCIS, *et al., Respondent.*

**PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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**PETITION FOR WRIT OF
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The Chamber of Commerce of the United States of America ("the Chamber") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Jt. App. pp. 100a-104a) ¹ is not yet officially reported. The order of the federal District Court (Jt. App. pp. 79a-85a) is reported at 379 F. Supp. 78.

¹ "Jt. App." refers to the Joint Appendix filed by the Chamber and the State of Maryland.

JURISDICTION

The judgment of the Court of Appeals (Jt. App. pp. 105a-106a) was entered on September 22, 1975. On December 4, 1975, the Chief Justice extended the Chamber's time in which to file a petition for a writ of certiorari to and including February 19, 1976 (Jt. App. p. 105a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether striker eligibility for welfare benefits is contrary to and inconsistent with the purpose of the Social Security Act and contrary to national labor policy expressed in the National Labor Relations Act.

STATUTES AND RULES INVOLVED

The relevant provisions of the Social Security Act (42 U.S.C. § 601 *et seq.*), the National Labor Relations Act (29 U.S.C. § 141 *et seq.*), the Food Stamps Act (7 U.S.C. § 2011 *et seq.*) and the Railroad Employment Insurance Act (45 U.S.C. § 351 *et seq.*) are set forth in the separate Joint Appendix.

STATEMENT

A. The Strike

Robert Francis ceased work on July 1, 1971, when he joined a strike in support of his collective bargaining representative at the plant where he was working. Throughout the strike Francis was an employee of American Smelting and Refining Co.² On September

² This Company is a member of the Chamber, and it is its injury, caused by direct federal financial support under the AFDC-UF program for its striking employees, which permitted the Chamber to intervene in this proceeding.

10, 1971, the strike ended and Robert Francis returned to work. During the two and one-half month strike, Francis applied to the Maryland Employment Security Agency for unemployment benefits. The State of Maryland, pursuant to its unemployment eligibility regulations, denied Francis unemployment benefits because his unemployment was voluntary and resulted from his own decision to participate in a labor dispute in support of his collective bargaining representative. Mr. Francis then sought federal benefits under the Aid for Dependent Children—Unemployed Father program (AFDC-UF).

Francis was declared ineligible for these welfare payments on the ground that such benefits need not be paid to “meet need due to being disqualified for unemployment insurance”. Thereafter, Francis, on behalf of himself and all other potential applicants similarly situated, filed an action in Federal District Court alleging that the denial of AFDC-UF benefits violated both the equal protection clause of the Constitution and Section 407 of the Social Security Act, 42 U.S.C. § 607, and the HEW regulations promulgated thereunder, 45 C.F.R. 223.100(a).

B. The Initial Proceedings

Pursuant to 28 U.S.C. § 2281, a three-judge court was constituted, and on January 28, 1972 issued its first decision in this proceeding (Jt. App. pp. 2a-34a). The three-judge court held that Maryland’s eligibility regulations violated HEW guidelines (Jt. App. p. 24a), and issued a decision requiring Maryland to pay AFDC-UF benefits to all employees whose need arose solely out of a labor dispute (Jt. App. pp. 28a-29a).

Pursuant to 28 U.S.C. § 1253, the State of Maryland appealed the three-judge court’s order to the Court.

On October 16, 1972, the Court affirmed the judgment without opinion (409 U.S. 904), apparently in reliance upon a memorandum submitted by the Solicitor General of the United States (Jt. App. pp. 56a-60a) which concluded that the case was not ripe for plenary review because the Secretary of HEW was about to amend the relevant regulations (Jt. App. p. 60a). The Court did not there consider the legislative history issue presented by the Chamber in the instant petition, and, as set forth below, the Chamber's appeal of this decision to the Court was denied not on the merits but "for lack of jurisdiction".

C. The Chamber Attempts To Intervene

On August 30, 1971, the Chamber sought leave to intervene before the three-judge court. The district court denied the Chamber's motion to intervene as a party but allowed it to participate *amicus curiae* (Jt. App. p. 4a). The Chamber filed a separate appeal (No. 71-1554) to the Court, limited to the intervention question, which was denied "for lack of jurisdiction." 409 U.S. 907 (1972). Thereafter, the Chamber appealed this issue to the Fourth Circuit which, on June 30, 1973, ruled it had subject matter jurisdiction because "the instant appeal is from a denial of a petition for intervention and not of an injunction." (Jt. App. p. 109a). The Court of Appeals concluded only that the district court did not abuse its discretion by denying the Chamber permissive intervention (Jt. App. p. 113a).³

³ The Fourth Circuit noted (Jt. App. p. 112a):

... "the district court's ruling on the Chamber's *amicus* argument was, at most, mere *dicta* and not binding on anyone. The district court did not rule on the merits of the Chamber's contention; its only *holding* was that the Chamber would not be permitted to intervene. (emphasis in original).

D. The Instant Proceedings

On July 12, 1972, the Secretary of HEW amended 45 C.F.R. 233.100(a)(1) ostensibly to permit each State to determine whether to provide AFDC-UF benefits to the children of fathers voluntarily idled from their employment because of their election to support their collective bargaining representative in a labor dispute. The Secretary specifically stated that he was neither speaking on behalf of Congress nor responding to a specific congressional mandate (Jt. App. pp. 124a-125a).

After publication of the amended HEW regulations on October 23, 1973, the Chamber timely filed a motion to intervene as a party. The District Court granted this motion on January 31, 1974 (Jt. App. pp. 106a-107a). The Chamber and the State of Maryland then moved to dissolve the injunction previously entered by the District Court (Jt. App. pp. 114a-116a). The Chamber urged, *inter alia* that the mandatory injunction was contrary to federal labor policy (Jt. App. pp. 119a-120a).

On June 25, 1974, the District Court issued its opinion, denying the motions to dissolve the outstanding injunction (Jt. App. pp. 79a-85a). The court acknowledged that its earlier opinion "literally read" encompassed the amended regulation issued by the Secretary on July 12, 1973 (Jt. App. p. 84a). The court now concluded with benefit of "hindsight" that the 1968 amendment to Section 607 of the Social Security Act, required the Secretary to promulgate standards rather than a national definition of unemployment. Because "(the July 12, 1973) amendment established no standards for the States to follow and simply permitted each State to do as it chose" (Jt. App. p. 84a), the court considered this amendment to be contrary to the Secretary's authority, and thus Maryland's regu-

lation denying benefits to strikers remained invalid (Jt. App. p. 85a).

The Chamber filed concurrent appeals to this Court and to the Fourth Circuit. On January 27, 1975, the Supreme Court denied the Chamber's appeal "for lack of jurisdiction" under 28 U.S.C. Sec. 1253. 420 U.S. 903.

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, in a per curiam opinion, upheld the District Court and adopted its opinion (Jt. App. p. 103a). With respect to the Chamber's contention, the court stated (Jt. App. p. 103a): "We do not view the national labor policy and the national social policy as irreconcilable, but if they are so viewed, there is presented a policy question for the Congress that is not for us to decide." The Court of Appeals acknowledged that the Secretary of HEW "has now determined that it should issue national standards", and noted "the Secretary's intention has not yet been implemented and that proposed regulations [Jt. App. pp. 121a-124a] have not yet been adopted" (Jt. App. p. 103a).

REASONS FOR GRANTING THE WRIT

A. Introduction

The decisions below which unqualifiedly enroll striking employees in the federal AFDC-UF program creates a signal tension between national welfare and labor policy never intended by Congress. In addition, these decisions are contrary to rulings of the Court interpreting the Social Security Act and the National Labor Relations Act. Accordingly, review is now essential "so that the obvious purpose in the enactment of each (of these statutes) is preserved." *Bhd. of R.R. Trainmen v. Chicago River and Ind. R.R.*, 353 U.S. 30, 40 (1957).

B. Congress Has Precluded Striking Employees from Receiving AFDC-UF Benefits During a Strike

The initial Aid for Dependent Children program (AFDC) limited eligibility only to needy children. 49 Stat. 629 (1935). See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 586 (1937), *Burns v. Alcala*, 420 U.S. 575, 581 (1975); *Philbrook v. Clodgett*, 421 U.S. 707, 709 (1975). Fifteen years later Congress authorized the payment of benefits to the adult relative of the dependent child, if the child met the State's need definition and had been deprived of the support of a parent by virtue of death, disability or absence from the home. 64 Stat. 551 (1950). Since eligibility could be obtained on no other basis, Congress rejected, in enacting the original program or the 1950 amendments, any notion that strikes arising out of collective bargaining created the type of hardships for dependents of workers in private industry which should be ameliorated by federal money. Congress knew how to provide striking employees with federal monies. Only two years before in 1933, Congress enacted legislation expressly providing striking workers with benefits under specified conditions pursuant to the Railroad Employment Insurance Act. 45 U.S.C. §§ 351, 354(a-2) (iii) (Jt. App. p. 129a). The absence of a similar express eligibility in the Social Security Act as amended in 1950 conclusively demonstrates that Congress did not originally fashion this legislation either by accident or design to provision dependents of employees on strike.

In 1961 Congress for the first time created benefit eligibility for an unemployed father of a dependent child (AFDC-UF). This amendment was not designed to provision children of striking fathers. Rather,

Congress desired to relieve need specifically occasioned by widespread long-term unemployment caused, not by economic strikes, but by the 1959-1960 economic recession. Congress also desired to eliminate any financial incentive for the father to abandon the home to render the child eligible for benefits. See Hearings on H.R. 3854 and H.R. 3865 before the House Committee on Ways and Means, 87 Cong. 1st Sess. pp. 94-95 (1961). This amendment then arose from the perception of a particular need and was fashioned as a means of transmitting the long-term unemployed into economically self-sufficient citizens. Hearings on H.R. 12080 before the Senate Committee on Finance, 90th Cong. 1st Sess. p. 264, 269. Indeed, the scope of the AFDC-UF program was expressly limited to fathers who lost jobs by operation of recessionary business cycles, and who needed financial assistance to maintain a family while actively seeking to re-enter the work force. 107 Cong. Rec. 3767-3768 (remarks of Congressman Byrnes); Report of Senate Committee of Finance of AFDC Benefits to Children of Unemployed Parents, 87th Cong. 1st Sess. (1961, Report No. 185), p. 3. Eligibility for fathers like Mr. Francis, whose financial need arises solely out of support for a strike, is wholly inconsistent with this legislative purpose. There is nothing ambiguous about the absence of reference to striker eligibility in 42 U.S.C. § 601 *et seq.*⁴

⁴ In one colloquy during debate Congressman Mills stated that "it is possible" that states could use "their own funds" obtained from "general taxpayers funds" to support persons unemployed as a result of a labor dispute. 107 Cong. Rec. 3766. This statement indicates only that Congressman Mills did not believe Congress could tell the States how to disburse their own funds and does not constitute a view that federal monies disbursed under the AFDC program could also be given to striking employees.

Seven years later Congress re-enforced and re-emphasized its commitment to a benefit program designed to insure productive citizens. The Federal Work Incentive Program (WIN), requiring benefit applicants to seek work or be amenable to job training in order to establish and maintain eligibility, was incorporated into the AFDC-UF statute. 81 Stat. 877, 42 U.S.C. § 606(b)(2) (1968).⁵

These amendments were designed not to expand existing eligibility, but to reduce the number of recipients by providing an economic incentive to improve employability. Since strikers, by virtue of their pre-strike employment are employable and self-sufficient workers who possess valuable job skills, there is no basis for inferring that Congress intended to authorize or approve striker eligibility in amendments distinctly designed to reduce the number of claimants and to convert recipients into better qualified workers. Indeed, Congress enacted a federal definition of unemployment which expressly limited eligibility for fathers of dependent children "who have had a recent attachment to the work force". H.R. Rep. No. 544, 90th Cong. 1st Sess. p. 108 (1967). See also S. Rep. No. 744, 90th Cong. 1st Sess. p. 160 (1967). Since striking workers

⁵ Congress further provided that the failure of an employable individual to conform to the work requirement would terminate benefits if an offer of employment or enrollment in a training program was rejected "without good cause". 42 U.S.C. §§ 602 (a)(19)(F), 607 (b)(1)(B), 607 (b)(2)(C)(i). See also *Philbrook v. Clodgett*, *supra*, 421 U.S. at 710-11.

Consistent with these amendments, the Secretary of HEW limited a bona fide refusal to accept employment to substandard wages, physical inability to perform the job and unsafe working conditions. Appendix B, Regulation Section 233.100 Title 45, C.F.R. Ch. II, Sec. 233.100. The Secretary apparently found no basis in the absence of supportive legislative intent to include striking as another valid reason to refuse available employment.

are defined under the National Labor Relations Act (Jt. App. . 132a) as retaining a full and continuing employment relationship with their employer during any type of strike (see *infra*, pp. 15-16), this amendment to the Social Security Act constitutes literal exclusion of striker eligibility under the AFDC-UF program.⁶

The restricted purpose of the AFDC-UF program, also reflected in 42 U.S.C. § 601, imposes definitional limitations upon the fathers who are within the class of intended recipients.⁷ As the Court stated in *Burns v.*

⁶ Congress also withdrew from participating states discretion to define "unemployment" "because of the wide variation in the definitions used by the States. In some instances, the definitions have been very narrow so that only a few people have been helped. In other states, the definitions have gone beyond anything that the Congress originally envisioned". H.R. Rep. No. 544, 90th Cong., 1st Sess. p. 108 (1967). This delegated discretion is limited by the purposes of the AFDC-UF statute, i.e., "to tie the program more closely to the work and training program authorized by the bill, and to protect only the children of unemployed fathers who have had a recent attachment to the work force". *Id.* p. 107-108. Since Congress did not intend to enroll striking employees as beneficiaries, the Secretary of HEW can not define unemployment to permit states to provision strikers, as is the case with the pending proposed regulations (Jt. App. pp. 121a-124a), because the Secretary's authority to formulate regulations must not be "inconsistent with this chapter". 42 U.S.C. § 1302 (Jt. App. p. 128a). Thus, while the Chamber and Maryland agree the mandatory injunction should be dissolved, the Chamber insists strikers are ineligible for AFDC-UF benefits by express federal welfare and labor policy and the exclusion is not optional. Since congressional intent is paramount to agency issued regulations, it is necessary, as the courts below recognized, to first consider the Chamber's contentions before those of Maryland.

⁷ 42 U.S.C. § 601 entitled "Authorization of Appropriation" (Jt. App. p. 126a) provides:

"For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabili-

Alcala, supra, 420 U.S. at 582-83 n.9: "Congress has not undertaken to provide support for all needy children . . ." The courts below erred in expanding the scope of the AFDC-UF program to include children of striking employees whose need arises solely out of the fathers' participation in a labor dispute.

This analysis is further supported by the fact that when Congress has intended to provide federal benefits to strikers it has done so in positive terms as in the Railroad Employment Insurance Act (45 U.S.C. § 351, 354 (a-2)), and the Food Stamps Act (7 U.S.C. §§ 2011-26).

The legislative history of the Food Stamps Act is particularly instructive. As originally enacted in 1964, this Act was not generally understood by Congress to provide eligibility for strikers. See 116 Cong. Rec. 42,015 (1970) (remarks of Cong. Abbitt).⁸ However, in the absence of express language disqualifying strikers, an increasingly large number of striking employees were able to obtain benefits.⁹ In 1970 Congress rejected efforts in the House and Senate to disqualify strikers

tation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and *to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection*, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purpose of this part". (Emphasis supplied)

⁸ "As a member of the (agricultural) committee in 1964, when this program started, I for one had no idea that food stamps were to be used to subsidize strikers".

⁹ See generally Carney, "The Forgotten Man on the Welfare Roll: A Study of Public Subsidies for Strikers", Vol. 1973 Wash. U.L.Q. 469, 513-14.

from receiving benefits, and, significantly, amended the statute to specifically provide that (Jt. App. p. 133a) "refusal to work at a plant or site subject to a strike or lockout for the duration of such strike or lockout not be deemed refusal to accept employment". 7 U.S.C. § 2014(c). This provision, although inartfully drafted, was expressly designed to approve striker eligibility because, as the relevant section of the Agricultural Committee's report states:

The secretary is free to establish whatever requirements he deems appropriate as to the method and time for strikers to register for employment or training at facilities not subject to a strike. H.R. Rept. No. 91-1402, 91st Cong. 2d. Sess. 10-11 (1970).

Thus Congress has not ignored the basic nourishment requirement of dependents whose fathers are on strike. But Congress did not provide for this need through direct financial support in the AFDC-UF program. Compare *Florida Power & Light v. Electrical Workers*, 417 U.S. 790, 807-8 (1974). Its silence in this respect, coupled with the explicit eligibility provided under the Food Stamps Act, is a persuasive indication that Congress did not desire to provide AFDC-UF funds for strikers. To paraphrase the Court in *Burns v. Alcala*, *supra*, if Congress had intended similar eligibility in the AFDC-UF program it would very likely have done so explicitly.¹⁰

¹⁰ In light of this legislative history, the defeat of several legislative efforts since 1968 to specifically exclude strikers' coverage under the AFDC-UF program is not determinative evidence that Congress intended to authorize such eligibility. H.R. 6004, 92nd Cong. 1st Sess. 197 (1971) (not reported out of committee); amendment to H.R. 1, 92nd Cong. 1st Sess., § 448, 1971 (defeated); see 118 Cong. Rec. 17052 (1972). (See also S. Rept. No. 92-1230,

C. The Decision Below Is Contrary to Rulings of the Court

In *Burns v. Alcala*, *supra*, the Court narrowly construed the Social Security Act to preclude federal benefits eligibility unless Congress has affirmatively legislated inclusion or intended coverage to be optional. 420 U.S. at 580-84. There, certain pregnant mothers sought AFDC benefits for unborn children who would be eligible upon birth. In the absence of any indication that Congress intended to provide federal assistance to dependent children before birth, the Court concluded that unborn children were not within the class of beneficiaries intended by Congress. With respect to dependent children of striking employees, there is not only no affirmative congressional indication of their eligibility, but as we have demonstrated above, such eligibility is fundamentally precluded by the federal definition of unemployment in Section 606 and by the basic purposes of the AFDC-UF program.

This conclusion is further reinforced by analogy to the recent ruling in *Carleson v. Remillard*, 406 U.S. 598 (1972). There, the Court's holding that children of fathers away from the home on military service were eligible for federal AFDC benefits was based in significant part on the rationale that, unlike union represented employees like Mr. Francis, personnel on active military service are without access to a union or to collective bargaining to assist the advancement of their economic circumstances. 406 U.S. at 603.

92nd Cong. 2nd Sess. 108, 472-73 (1972) amendment deleted before bill voted on the Senate floor). 118 Cong. Rec. 16815. Rather, it is at least as plausible to infer that these amendments originated out of congressional awareness of erroneous interpretations of the purposes of this program, and therefore simply constitute an effort to clarify the original congressional intent. "It would be equally plausible to suppose that (the drafters) thought HEW had misinterpreted the Act and wanted to make the original intent clear". *Burns v. Alcala*, *supra*, 420 U.S. at 586 n.12.

The decision below stands this reasoning on its head, and substitutes without supporting Congressional legislation unqualified direct federal financial subsidies for striking employees while they concurrently advance their economic interests at the collective bargaining table.

D. The Decision Below Is Contrary to National Labor Policy

As we have shown, *supra*, pp. 7-12, the Social Security Act provides no implication whatever as originally enacted in 1935 or as amended that Congress was concerned about the effects strikes had on strikers' dependents. The economic adversity, if any, suffered as a result of a strike was not the type of misfortune which Congress intended to mitigate by direct federal financial assistance. Congress intended the AFDC-UF program to protect children and the nuclear family from employment disruption caused by the impersonal operation of recessionary business cycles.

In stark contrast, the concurrently enacted congressional solution for advancing the economic well-being of the family of the employed worker was to grant the breadwinner, in the Wagner Act of 1935, the freedom to strike and to engage in other federally protected rights to force his employer to accede to his demands for increased wages and monetary benefits and thereby improve his standard of living through self-help. 29 U.S.C. § 163.¹¹ It was Congress' judgment in 1935 that redressing the balance of bargaining power between employer and employee by protecting the worker's right to strike and bargain collectively would reduce

¹¹ 29 U.S.C. § 163 provides:

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

industrial strife, ameliorate business depressions, and improve wages. 29 U.S.C. § 141.¹² This is so because:

Freedom to strike, to picket, and to engage in other concerted activities affects the progress of union organization and the balance of power in collective bargaining. The progress of organizations and the balance of power affect the way collective bargaining works. Cox, "Federalism in Labor Law", 67 Harv. L. Rev. 1297, 1317 (1954).

Congress further protected the job rights of striking employees in the Wagner Act by defining an employee to "include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . . 29 U.S.C. § 152(3). As the Court has observed: "[t]he status of the striker as an employee continues until he has obtained 'other regular and substantially equivalent employment'". *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967). Thus, Mr. Francis' effort to find other work during the 1971 strike does not render him "unemployed" within the meaning of the NLRA, nor would it give American Smelting Co. a legitimate basis for rejecting his offer to return to work. It is equally well established that the act of striking does not itself render the striker unemployed. A "strike" is "a combined effort on the part of a body of workmen *employed* by

¹² Section 1 of the NLRA, entitled "Findings and Policies" provides in pertinent part: "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantively burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries" (Jt. App. pp. 130a-132a).

the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted". *C.G. Conn. Ltd. v. NLRB*, 108 F.2d 390, 396 (7th Cir. 1939). (emphasis supplied); see also *Columbia Pictures Corp.*, 82 NLRB 568, 577 (1949).

These definitional protections for the job security of striking employees, who elect to utilize "the ultimate weapon in labor's arsenal for achieving agreement upon its terms",¹³ enables workers to use economic pressure to force employer concessions which advance their monetary compensation without concurrent job forfeiture. See also *NLRB v. Laidlaw Corp.*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 290 (1970); "Reinstatement: Expanded Rights for Economic Strikers" 58 Calif. L. Rev. 511 (1970). The NLRA, however, "does not contemplate that unions will always be secure and able to achieve agreement". *Porter v. NLRB*, 397 U.S. 99, 109 (1970). Strikes often result in hardships for participants. "The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident". *NLRB v. Granite State Joint Bd.*, 409 U.S. 213, 217 (1972). These consequences are not to be mitigated by either federal or state interference because national labor policy "leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free". *Phelps Dodge Corp., v. NLRB*, 313 U.S. 177, 183 (1941); *Accord: NLRB v. Burns*, 406 U.S. 272, 288 (1971); *Motor Coach Employees v. Missouri*, 374 U.S. 74, 82 (1963); *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959).

¹³ *NLRB v. Allis-Chalmers*, 388 U.S. 175, 181 (1967).

The decision below, which permits striking employees to receive federal monies during the strike term, is contrary to this statutory scheme. Congress invited employees to advance their own and concurrently their families' economic sufficiency, not as the court below held, by requesting federal money, but by the exercise of rights protected under the NLRA. See also *Macias v. Finch*, 324 F. Supp. 1252, 1257 n.3 (N.D. Cal.), *aff'd*, 400 U.S. 913 (1970) (fair labor standard legislation not welfare laws established wage floor).

The Court recognized in *Super Tire Engin. Co. v. McCorkle*, 416 U.S. 115, 124 (1974):

It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective bargaining agreement, and is a factor lurking in the background of every incipient labor contract.

There the State of New Jersey paid certain striking employees financial benefits during a strike under a state general assistance law and under the federal AFDC program. The Court observed that state created eligibility did have an adverse impact upon collective bargaining and alters the balance of power struck by Congress in the NLRA, and then stated (416 U.S. 124):

The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes.

Thus, the Court held that as a matter of law the permissibility of public assistance for strikers is to be resolved by reference to labor statutes and expressions of Congressional intent. The Court of Appeals properly considered this question as one of statutory interpretation of federal welfare and labor policy but erred in

concluding that Congress has not resolved this question in favor of ineligibility for federal welfare benefits. Accordingly, review of this important and recurring question⁴¹, which the Court has not previously considered, is now timely.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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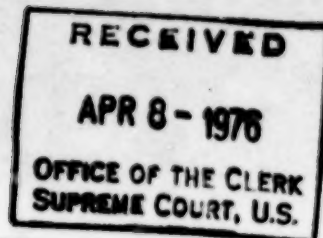
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¹⁴ *Eg.*, *I.T.T. Corp v. Minter*, 435 F.2d 909 (1st Cir.), *cert. denied*, 402 U.S. 933, *rehearing denied*, 404 U.S. 874 (1971); *National Gypsum Co. v. Administrator, La. Dept. of Employment Security*, 313 So.2d 527 (La. Sp.Ct. 1975), *appeal dismissed* 44 U.S.L.W. 3340 (December 9, 1915) (No. 75-299); *Kansas City Star Co. v. Dept. of Industry, Labor and Human Relations*, 211 N.W.2d 488 (Wis. Sup.Ct. 1973), *rehearing denied*, 217 N.W.2d 666 (1974), *cert. denied*, 419 U.S. 870 (1974); see also *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir. 1973); *Hawaiian Telephone Co., et al, v. Hawaii*, — F. Supp. — (D. Hawaii 1975), 90 LRRM 2854; *Shell Oil Co. v. Brooks*, — F. Supp. — (No. C74-1935 (W.D. Wash.)); *Johns-Manville Prods. v. Doyal*, 510 F.2d 1196 (5th Cir. 1975).



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-1182

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, Petitioner

v.

ROBERT FRANCIS, et al., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the district court and court of appeals were correct in holding 45 C.F.R. §233.100(a)(1)(ii), which defines eligibility for welfare benefits for children of unemployed fathers, to be violative of the requirements of 42 U.S.C. §607(a) and therefore invalid.

REASONS FOR DENYING THE WRIT

The issue in this case (Francis II) is very narrow. The district court's refusal (App. 79a) to dissolve the injunction issued in 1972 in Francis I (App. 2a) was affirmed by the Fourth Circuit (App. 103a). The Chamber now seeks review of these decisions. It has failed, however, to show a conflict of decisions or an important question of federal law properly raised by this

case. It is indeed most doubtful that the Chamber's labor law issue is properly a part of this second Francis case.

A. The Chamber's Labor Law Preemption Issue Is Not Properly a Part of Francis II

1. This issue became final in Francis I

In Francis I the district court resolved adversely to the Chamber its issue that the payment of AFDC-UF benefits to the children of strikers conflicts with national labor policy (App. 20a). The court also found that paying AFDC-UF benefits to these children was not precluded by the purposes or the language of the Social Security Act (App. 24a-29a). When the district court decision was summarily affirmed by this Court, 409 U.S. 904, the holdings of the district court became the final law of this case.

The motion to the district court to dissolve the injunction entered in Francis I was based entirely on H.E.W.'s change in regulations. Because the sole question raised on the motion to dissolve was whether events subsequent to the issuance of the injunction required its dissolution, see Fed. R. Civ. P. 60(b)(5), the NLRA preemption issue could not have been and indeed was not again injected into this case. The motion did not reopen other nonrelated issues finally decided in the case.

2. There is no evidence in the record relating to the preemption issue.

The issue of conflict with national labor policy was first raised by the Chamber in its motion to intervene in Francis I. Various facts were proffered to the district court to support its position. The court assumed the validity of these facts arguendo but then rejected the argument. Because these facts were never entered into evidence, respondent had no opportunity to rebut them. Consequently, there is no evidence in the record to support the Chamber's position on this issue. Without a factual basis to rely upon, this Court would be extremely ill-equipped to deal with the very expansive issues sought to be raised by the Chamber.

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B. There Is No Conflict of Decisions

The Chamber has not cited any decision of this Court in conflict with Francis II. The two cases it cites as "contrary rulings" do not address the issues raised in this case. Both involve the AFDC program of 42 U.S.C. §606, as opposed to the AFDC-UF program of 42 U.S.C. §607, and neither concerns the question of granting or denying benefits on the basis of national labor policy.

C. There Is No Important Question of Federal Law

1. The impact of this decision is minimal on a national scale

The district court in Francis I noted that there were twenty-two states besides Maryland with AFDC-UF programs. Of these states, one gave no benefits to the children of strikers, two denied benefits to children of strikers unless their involvement was due to a lockout, and two denied benefits to children of strikers unless they were involved in a "legal" strike (App. 19a n.22). Thus only five states besides Maryland deny benefits to children of any or all economic strikers.

2. The H.E.W. regulation at issue in this case is likely to be amended in the near future

There is substantial likelihood that the HEW regulation involved in this case will be changed in the near future. The Fourth Circuit acknowledged this possibility in its opinion (App. 103a n.1). Proposed new regulations have already been published by HEW (App. 121a-124a). A similar situation developed when the district court's decision in Francis I was on appeal to this Court. At that time, the Solicitor General informed the Court that the Secretary was in the process of amending the HEW regulations. The Solicitor General therefore recommended that "[i]n these circumstances, this case does not warrant plenary review by this Court." (App. 60a). The Court summarily affirmed the district court decision.

It is again quite probable that any decision by this Court would be quickly mooted by a change in the regulation. Accordingly, plenary review is

unwise at this time. Compare Richardson v. Wright, 405 U.S. 208 (1972); White v. Regester, 422 U.S. 935 (1975).

D. The Decision Below is Clearly Correct

1. Because he failed to promulgate a federal definition of unemployment, the Secretary's regulation is invalid

It is quite clear that Congress intended that the Secretary would promulgate a standard nation-wide definition of "unemployment." Under the original AFDC-UF enactment, Pub. L. 87-31, §407, 75 Stat. 75 (1961), the definition of an "unemployed parent" was left to each participating state. Finding that this led to "wide variations in the definitions used by the states,"^{1/} Congress amended the Act in 1967 to provide that "the definition of unemployment would be made by the Federal Government."^{2/} Thus, in order to attain "a uniform definition of unemployment throughout the United States,"^{3/} Congress amended the Act to grant a child's father benefits if he was "unemployed (as defined by the Secretary) . . ."^{4/}

Rather than prescribing uniform standards for defining unemployment, however, the Secretary promulgated a regulation that declared that a state's definition of unemployment

need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the state's unemployment compensation law.

45 C.F.R. §233.100(a)(1).

^{1/} See, e.g., H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967), quoted in Francis I, see App. 46a.

^{2/} See, e.g., H.R. Rep. No. 544, 90th Cong., 1st Sess. at 17, quoted in Francis II, see App. 85a.

^{3/} Report of U.S. Senate Comm. on Finance, Social Security Amendments of 1967 at 4 (Nov. 14, 1967).

^{4/} H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967). The amended section of the statute (42 U.S.C. §607(a)) is set out at App. 127a. -4-

This definition leaves each participating state with at least eight different options as to which of its unemployed fathers can receive AFDC-UF benefits for their children. By delegating these options to the states, the Secretary acted contrary to Congressional intent and the language of the statute.

The Francis II courts found that the Secretary's regulation had failed to set national standards for defining unemployment (App. 85a). It therefore correctly ruled the HEW regulation invalid and refused to modify its prior injunction.

2. Congress did not intend to disqualify children of fathers unemployed due to a labor dispute from AFDC-UF benefits
 - a. Legislative history of the Social Security Act

When the 1961 AFDC-UF legislation was being debated, Congressman Mills, the legislation's spokesman, explicitly stated that states could grant strikers AFDC-UF benefits if they chose to do so. See 107 Cong. Rec. 3526 (Mar. 10, 1961). No one contested this statement. Furthermore, Congress has several times defeated legislative efforts to specifically amend the AFDC-UF program to exclude strikers' coverage. See Chamber's Petition at 13-14, n.13 for a listing of these efforts.

As the district court pointed out in Francis I, the final legislative intent was not clearly shown by legislative debate (App. 23a n.25). However, the Act on its face covers the children of "unemployed" fathers. Respondents' class are unemployed and out of work. In such a situation,

a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional.

Burns v. Alcala, 420 U.S. 575, 580 (1975). No such clear indication can be shown. Accordingly, respondents are entitled to the Act's coverage.

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- b. National labor policy does not preclude payment of AFDC-UF benefits to children of fathers unemployed due to a labor dispute

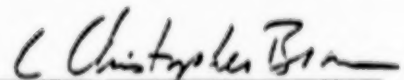
The Chamber has cited to this Court no case which supports its proposition that the National Labor Relations Act preempts federal welfare policy in such a way as to preclude Congress or the Secretary from paying the needy children of fathers out of work due to a labor dispute subsistence welfare benefits, such as AFDC-UF. The Chamber's reliance on dicta from Super Tire Engine Co. v. McCorkle, 416 U.S. 115 (1974), is surely misplaced. The issue in Super Tire was mootness; the Court never reached the merits.

The Francis I court rejected the Chamber's assertions of preemption with a reference to the First Circuit's decision in ITT Lamp Div. v. Minter, 435 F.2d 989 (1st Cir.), cert. denied, 402 U.S. 933, pet. for reh. denied 404 U.S. 874 (1971). The ITT opinion held that the N.L.R.A. did not preclude Massachusetts from making welfare benefits available to strikers. The court in ITT stated that the proper forum for this controversy is the Congress. 435 F.2d at 993-994. In Francis II, the Fourth Circuit agreed (App. 103a). Because the Chamber has made no record on this question, it seems doubly improper for the Court to consider this broad question in the context of this case.

CONCLUSION

For any or all of the foregoing reasons, the Chamber's petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April 1976, I mailed postage prepaid, copies of the foregoing Brief for Respondents in Opposition to Gerard C. Smetana, attorney for the Chamber of Commerce, and Joel Rabin, attorney for the State of Maryland.


C. Christopher Brown

Attorney for Respondents

No. 75-1182

Supreme Court, U. S.

FILED

APR 23 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

THE CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA, *Petitioner,*

v.

ROBERT FRANCIS, *et al., Respondent.*

**PETITIONER'S REPLY TO RESPONDENT'S
OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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IN THE
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**PETITIONER'S REPLY TO RESPONDENT'S
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INTRODUCTION

Francis urges that certiorari review is premature or inappropriate because (Opp. p. 2) the "labor law pre-emption" issue was not raised in the Chamber's motion to dissolve the mandatory injunction issued by the District Court (Jt. App. pp. 54a-55a), and this Court previously rejected the Chamber's argument when it summarily affirmed the *Francis I* decision. 409 U.S. 904 (1972). Francis further urges (Opp. pp. 3-4) that if the Chamber's position was before the *Francis II* court, review is "unwise at this time" because "there is substantial likelihood that the HEW regulation involved in this case will be changed in the near future." And finally, Francis contends

(Opp. p. 3) that no important question of federal law is raised by the Chamber's petition.

Each of these contentions not previously discussed in the Chamber's petition will be addressed in Part I of this response. Part II will answer Francis' contentions that the District Court's mandatory injunction is valid, and that Congress is the only forum for resolution of the tension between federal and welfare policies resulting from federal welfare payments to strikers.

I. REVIEW OF THE IMPORTANT ISSUE REMANDED IN SUPER TIRE IS TIMELY

The Court in *Super Tire Engin. Co. v. McCorkle*, 416 U.S. 115 (1974) remanded the case to the district court to determine only one question, namely (416 U.S. at 124) "whether Congress, explicitly or implicitly, has ruled out [state and federal] assistance (to persons on strike) in its calculus of laws regulating labor-management disputes." The instant petition presents the Court with the opportunity to rule on this issue, and as we show below there are no procedural or technical infirmities to review.

The Court's summary affirmance of *Francis I* on October 16, 1972, does not bar the instant petition because the Chamber's position presented here was not before the Court at that time. The only party with appeal rights on the merits in *Francis I* was the State of Maryland. Maryland's appeal was limited to the validity of the HEW Secretary's regulations. The Chamber could only appeal the district court's denial of the Chamber's intervention motion (Jt. App. p. 4a, n.7), which the Court dismissed "for lack of jurisdiction." 409 U.S. 907 (1972). Moreover, the Court

would not have remanded *Super Tire, supra*, for further proceedings if its *Francis I* affirmance had reached the legislative history arguments raised here by the Chamber. To be sure the Chamber, as *amicus*, was permitted by the *Francis I* court to introduce evidence by affidavit that such payments encourage strikes, and to urge that national labor policy precluded striker eligibility, and the three judge court addressed this issue. (Jt. App. pp. 18a-20a). But because the Chamber had been denied full party status and could not appeal the *Francis I* ruling, neither that decision nor the Court's summary affirmance constitutes litigation of the instant question, or renders those rulings the law of the case.

Francis also errs in contending that the instant issue was not before the *Francis II* court. This same contention was raised in the Court of Appeals and the Fourth Circuit properly rejected it (Jt. App. p. 103). The legislative policy issue presented here was fully litigated and decided by the *Francis II* court. On January 31, 1974 the court granted the Chamber's motion to intervene without limiting in anyway the issues which could properly be raised (Jt. App. pp. 106a-107a). In its Pre-Hearing Memorandum the Chamber urged that Maryland could deny strikers benefits under the amended HEW guidelines because if the District Court agreed, there would be no necessity for reaching the legislative history question (Supp. Jt. App. p. 1a,¹ Jt. App. pp. 115a-116a). In the event the District Court elected to reaffirm its *Francis I*, the Chamber also expressly preserved its

¹ This portion of the Chamber's Pre-Hearing Memorandum was inadvertently omitted by the printer from the Jt. App.

contention "that the federal collective bargaining scheme precludes the payments to striking employees at issue here." (Supp. App. p. 1a). And during oral argument the Chamber also urged that, if the three judge court reaffirmed its earlier decision it would thereby reach the remanded *Super Tire* issue (Jt. App. 119a-120a). The Chamber was careful not to raise any factual issues because *Super Tire* limited the resolution of the controversy to scrutiny of Congressional intent. More extensive argument by brief or oral argument on this issue was unnecessary and superfluous because as noted above, this issue was fully briefed to the same three judges who had previously indicated their views on this argument in *dicta* in *Francis I*. There can be quarrel over the fact that this so-called labor law issue was before the district court.

The District Court's reaffirmation of its mandatory injunction in its *Francis II* opinion ruled *pro tanto* on the Chamber's contention. Its holding that federal welfare policy authorized striker eligibility for AFDC-UF implicitly reaffirmed and incorporated its holding in *Francis I* that such eligibility was not contrary to or inconsistent with federal labor policy. The text of the District Court's *Francis II* opinion concerns only that portion of the *Francis I* opinion which it desired to change.² The court considered it

² "Candor requires this Court to state that the language used by this Court in its earlier opinion in describing the three alternatives available to the Secretary does—literally read—permit the amendment promulgated by the Secretary on July 12, 1973. That language could have, and from hindsight should have, included as part of alternative (3) and after the words 'to leave that decision to each state' the additional words 'in accordance with appropriate standards established by the Secretary'." (Jt. App. p. 84a).

unnecessary to republish *in toto* its earlier ruling on the Chamber's contentions, particularly since as indicated by the identical docket number, this proceeding was merely a continuation of the *Francis I* litigation. In these particular circumstances appeal is not dependent upon an express ruling on the Chamber's position which was timely raised before the *Francis II* court. See *Washington Gas Light v. Virginia Elec. Power Co.*, 438 F.2d 248, 250-51 (4th Cir. 1971). Thus, the labor law issue is properly the subject of appeal to this Court.³

Nor is there any basis for denying review because the former HEW Secretary Caspar W. Weinberger issued proposed amendments to 45 C.F.R. § 233.100 (a)(1) on August 4, 1975 (Jt. App. 121a-124a). The present HEW Secretary David Mathews has publicly taken the position that any amendments will not be approved while this Court and other federal courts are considering whether Congress intended that strikers should be eligible for benefits under federal welfare or state unemployment compensation statutes.⁴ Unlike the circumstances presented in the authorities relied upon by Francis,⁵ there is no warrant to withhold judicial action on this petition because there is no probability that new amendments will moot issues decided below. Indeed, denial of review will leave HEW without controlling guidance with respect to

³ There is no dispute that the Court of Appeals reached and ruled upon the Chamber's contentions.

⁴ *The Wall Street Journal*, April 5, 1976, at p. 4 col. 3; *The Washington Star*, April 7, 1976, at p. A26 col. 3. See Supp. Jt. App. pp. 2a-6a.

⁵ *White v. Regester*, 422 U.S. 935 (1975); *Richardson v. Wright*, 405 U.S. 208, 209 (1972).

HEW's authority to formulate any regulations on striker eligibility. And denial of review will necessitate relitigation of the present controversy regardless of what regulation HEW may ultimately issue.

Even if amendments were to issue, review would still be warranted here because legislative intent must be determined *before* the question of the HEW Secretary's definitional discretion can be reached. *Big Rivers Elec. Corp. v. E.P.A.*, 523 F.2d 16, 19 (6th Cir. 1975), *cert. denied*, — U.S. — (April 19, 1976) (No 75-774). And since striker eligibility for AFDC-UF benefits has been upheld by the decisions below under *existing* HEW regulations, a challenge to this ruling on the grounds that such eligibility is contrary to legislative intent does not become moot even when the regulations are actually amended. *National Coal Operators Assn. v. Kleppe*, — U.S. —, 96 S.Ct. 809, 812 n. 4 (1976).

Finally, Francis implausibly argues that the decisions below, which enroll strikers in the AFDC-UF program in the five states within the jurisdiction of the Fourth Circuit without explicit or even implicit Congressional authorization, somehow does not present an important federal question. The Court in *Super Tire* believed an important question had been raised there with respect to the State of New Jersey's practice of awarding both federal and state welfare benefits to strikers. In *Hill v. Florida*, 325 U.S. 538 (1944), the interference with national labor policy by one states' reporting requirements for labor organization was deemed sufficient to justify nullification of the state statute. The instant case not only adversely affects the six states which deny AFDC-UF benefits to strik-

ers,⁶ but also gives colorable legality to the other 28 states and the District of Columbia which automatically pay strikers these benefits under the AFDC-UF program. See Carney, "A Study of Subsidies for Strikers". Vol. 1973, Wash. U.L.Q. 469, 479 n.49. And this decision may well give impetus to the other 16 states not currently participating in the AFDC-UF program to apply in order to substitute federal money for state funds paid strikers under state unemployment compensation laws.

The nationwide prevalence of strikes and the large number of strikers involved creates demand upon welfare monies of a significant and growing dimension. The widespread state federal subsidies under the AFDC-UF program also creates a substantial federal strike fund of perhaps as much as \$62 million per year, which encourages strikes and unfairly gives strikers an unintended advantage in the exercise of economic weapons. To accept Francis' views that federal financing of strikers is *de minimus* on a national scale is to blink at this reality.

The materiality and timeliness of the issue raised by this appeal was underscored in the 1972 Report of the Committee on State Labor Law of the American Bar Association, as follows:

The recent studies, along with the increased amount of litigation and the interest of numerous states in seeking a solution to this issue, suggest a need for some action. The present confusion on this issue has resulted in strikers being granted or denied public assistance on the basis of a particular state's interpretation of national labor policy or the state's interpretation of federal and state welfare legislation. It is doubtful whether

⁶ Maryland, Oregon, Kansas, Nebraska, Delaware, Pennsylvania.

the confusion on this issue will lessen in the year ahead and it would therefore be preferable to have the issue resolved on a uniform basis rather than perpetuate the current confusion.

A.B.A. Sec. of Lab. Law, 1972 Committee Repts., p. 301 (footnotes omitted).

II. THE DECISIONS BELOW WHICH ENROLL STRIKERS IN THE AFDC-UF FEDERAL WELFARE PROGRAM ARE CONTRARY TO FEDERAL WELFARE AND LABOR POLICY

Francis insists (Opp. pp. 4-6) the Court of Appeals properly affirmed the District Court's injunction mandating that striking employees receive AFDC-UF benefits during the time they are on strike. Francis argues initially that the regulations amended by the HEW Secretary are invalid because they fail to create a national definition of unemployment. This argument begs the threshold question whether the Secretary has *any* discretion under the Social Security Act to issue regulations which create express or optional AFDC-UF eligibility for persons, like Mr. Francis, whose need arises solely from the free election to withhold services and strike in support of their union's collective bargaining demands. The Court has ruled that unless Congress has affirmatively indicated eligibility, claimants cannot obtain federal welfare benefits (*Burns v. Alcala*, 420 U.S. 575, 580-84 (1975)), and the HEW secretary has no authority *sua sponte* to create such eligibility. "(Executive regulations) are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429 (1935). As we have demonstrated in the Petition, Congress has affirmatively placed strikers outside the reach of the

AFDC-UF welfare program, and expressly indicated in sections 2(3) and 9(c)(3)⁷ of the National Labor Relations Act that strikers remain employees of the struck employer.

Francis also argues (Opp. p. 6) that the only appropriate forum for the resolution of the present controversy is Congress. This argument was specifically rejected in *Super Tire Engin. Co. v. McCorkle*, *supra*, where the Court ruled that public support for strikers issue was justiciable within the meaning of the "case and controversy" language of Article III of the Constitution. The Court did not remit *Super Tire* to the legislative branch of government; the Court remanded the case for further proceedings in the federal district court. "The judiciary must not close the door to the resolution of the important questions these concrete disputes present." 416 U.S. at 127.

Francis relies upon the First Circuit's opinion in *Minter*,⁸ which held only that Congress might be the "preferable" forum, but by no means the only forum. The same court reiterated in *Grinnell Corp.*⁹ that the welfare for strikers issue could be resolved in a judicial forum, and then remanded the case to the district

⁷ Section 9(c)(3) provides:

Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

Section 2(3) is set forth at p. 132a of the Jt. App.

⁸ *ITT Lamp Div. v. Minter*, 435 F.2d 989 (1st Cir.), *cert. denied*, 402 U.S. 933, *pet. for reh. denied*, 404 U.S. 874 (1971).

⁹ *Grinnell Corp. v. Hackett*, 475 F.2d 449, 453-54, *cert. denied*, 414 U.S. 858 (1973).

court for further proceedings. The Fourth Circuit improperly and erroneously ignored both *Grinnell* and the Court's opinion in *Super Tire* in concluding that (Jt. App. 103a) no tension existed between the payment of federal welfare money to strikers and national labor policy and that if it was wrong, resolution rested with Congress.¹⁰

¹⁰ Francis also urges that review is unwarranted because the Chamber has cited no cases declaring that national labor policy pre-empts federal welfare policy with respect to the eligibility of strikers for AFDC-UF. But, the issue raised here is the harmonization of the legislative intent of these federal statutes so that each fully achieve its purpose. A preemption question arises when a state acts unilaterally by statute or policy in an area subject to federal regulation, not, as here, when a state acts under color of federal regulations. See *ITT Lamp Div. v. Minter, supra*, 435 F.2d at 994: "The activity allegedly intruding into federal labor policy is not solely a state activity but rather a joint state-federal program."

Francis also urges (Opp. pp. 2, 6) that the record is inadequate for proper review. In *Super Tire, supra* the Court posed only one issue, namely Congressional intent as to public support for strikers, and thus further evidence of impact upon the collective bargaining process is unnecessary. This petition presents the answer to this question on analysis of both federal welfare and labor policy. It, however, the Court deems additional evidence relevant on the adverse impact welfare payments has upon the policy of free collective bargaining, a remand to the district court would be appropriate.

CONCLUSION

For the reasons set forth above, as well as those advanced in the petition, it is respectfully submitted that a writ of certiorari to the Fourth Circuit should issue.

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April, 1976

SUPPLEMENTAL JOINT APPENDIX

SUPPLEMENTAL JOINT APPENDIX

IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MARYLAND

Civil Action No. 71-853-K

ROBERT FRANCIS, et al., *Plaintiffs*,

VS.

DAVID T. MASON, et al., *Defendants*.

**Pre-Hearing Memorandum for the Chamber of Commerce of the
United States of America**

Pursuant to Local Rule 9, the Chamber will briefly outline the issues that, it submits, require this Court's consideration: (1) whether the Secretary of H.E.W. has established proper "standards" within which the states may disburse A.F.D.C. benefits; and (2) whether, wholly apart from the disputed standards, the State of Maryland is still free to deny benefits to striking employees pursuant to other provisions of the same statute requiring recipients to accept available work. By arguing only these points, the Chamber does not, of course, waive its arguments previously made to this Court, particularly in light of a recent decision of the Supreme Court in *Super Tire Engineering Co. v. McCorkle*, — U.S. —, 42 L.W. 4507 (April 16, 1974), viz., that the federal collective bargaining scheme precludes the payments to striking employees at issue here. The Chamber will limit its presentation to the validity of Maryland's policy with regard to any other issues.

1. As this Court has already recognized, Congress delegated the "policy making function" of setting (continued at p. 115a of the Jt. App.)

[The Washington Star, Wednesday, April 7, 1976]

H.E.W. ABSTAINING FROM DISPUTE ON WELFARE PAY

Associated Press

The Department of Health, Education and Welfare said yesterday it will not push forward a proposal to deny welfare payments to strikers while federal courts are considering the question.

The controversy has existed for several years between organized labor and big business.

The AFL-CIO contends that denial of public assistance to strikers would punish innocent women and children. The U.S. Chamber of Commerce and the National Association of Manufacturers argue that welfare payments give union workers an unfair advantage in labor disputes and may actually encourage strikes.

The decision not to intervene in the dispute was made by HEW Secretary David Mathews last December shortly after he took office but was not announced at that time.

[The Wall Street Journal, Monday, April 5, 1976]

HEW SECRETARY SHELVES PROPOSAL TO BAR MOST STRIKERS
FROM GETTING WELFARE AID

By Jonathan Spivak, *Staff Reporter*
of The Wall Street Journal

Washington—Health, Education and Welfare Secretary David Mathews quietly has shelved a highly controversial proposal that would bar most strikers from receiving welfare benefits.

Mr. Mathews' move may be smart politics, avoiding as it does an explosive issue in an election year. But it merely delays that day when HEW must decide which side it supports in this long-festering controversy between unions and business.

The restriction on welfare benefits to strikers was proposed by HEW Secretary Casper Weinberger just before he left office last year. It would permit payment of welfare benefits only to strikers in states that also permit them to receive unemployment insurance. (Only New York and Rhode Island have such a provision.)

Currently, HEW regulations leave the welfare-striker decision entirely up to the 26 states that give assistance to unemployed workers under the Aid to Families with Dependent Children, or AFDC, welfare program. Nineteen of the 26 states provide benefits to strikers.

Welfare payments to the unemployed will total \$750 million in the current fiscal year, ending June 30, about 10% of all AFDC payments. HEW says there aren't any accurate estimates of the amount going to strikers, but some in the past have ranged from \$2.5 million to \$62 million a year.

The Adversaries' Arguments

The AFL-CIO bitterly opposes the Weinberger proposal on the ground that welfare aid should be based on need alone. Excluding strikers from welfare is punitive and deprives them of assistance when they need it most, organized labor argues. It views the Mathews decision as a tentative victory, although recognizing the fight is far from over.

The Mathews' decision is a setback for the Chamber of Commerce and the National Association of Manufacturers, which have been fighting to limit strikers' access to welfare. They argue payment of benefits during a strike gives workers an unfair bargaining advantage. It allows them to minimize use of their own strike funds, encourages them to hold out longer and even may be a factor in their decision to go on strike, says the chamber. [sic] "We would have liked them (workers) to stop getting AFDC benefits," concedes one chamber expert.

HEW is being pushed to deal with the welfare-striker issue by the courts. A Maryland welfare plan that denied aid to strikers was overturned in federal court in 1972 on grounds that the department had failed to establish standards that would permit exclusion of strikers. At that time, the regulations didn't specifically deal with strikers. HEW then issued new regulations that gave the states the authority to exclude strikers from their AFDC programs.

Still in the Courts

But the Maryland court, and subsequently the Fourth Circuit Court of Appeals again ruled that the HEW didn't establish a valid federal standard for denying aid. The Weinberger proposal, which constituted a dramatic switch in HEW policy was a second effort to meet the court's objections. But the Maryland case is being appealed to the Supreme Court and Mr. Mathews has decided to wait until the court acts before changing the regulations again. It's

an easy way of buying time in one of the toughest controversies he faces.

His decision means that in most of the country, states will remain free to include or exclude strikers from their AFDC welfare programs. Iowa, Kansas, Kentucky, Minnesota, Nebraska and Oregon exclude strikers. But payments will be mandatory in states within the jurisdiction of the Fourth Circuit Court, where just West Virginia and Maryland deny such aid.

The HEW Secretary has been under heavy pressure on the striker issue from both the chamber and the AFL-CIO. The chamber has made elimination of welfare benefits for strikers one of its highest priorities. It has launched a series of legal challenges, not only to payment of welfare, but also to unemployment insurance for strikers. "The most important reason is that public subsidies to strikers interfere with, and eventually could destroy, the collective bargaining concept as the method for labor management negotiations," reasons Richard L. Leshner, chamber president.

Meany Ties Rights to Taxes

The AFL-CIO is equally adamant and has lobbied hard for a HEW regulation that would make payment of benefits to strikers mandatory.

While few members will benefit and the impact on collective bargaining won't be great, the right to payments should be made as a matter of equity, the federation insists. "Workers are taxed to pay the cost of welfare—they should have the same rights as all other citizens to obtain welfare assistance," declares George Meany, AFL-CIO president.

Labor leaders realize that HEW curtailment could set a precedent for restricting other benefits for strikers, particularly food stamps, which have been widely used. They

may also be looking ahead to the possibility of a new federal welfare program, advocated by many politicians, which would broaden AFDC coverage to include many more of their members; currently, most workers are excluded. If so, the unions would want the principle of payment to strikers firmly established.



OCT 21 1976

MICHAEL RODAK, JR., CLERK

Nos. 75-1181 and 75-1182

In the Supreme Court of the United States**OCTOBER TERM, 1976**

RICHARD A. BATTERTON, ET AL., PETITIONERS**v.****ROBERT FRANCIS, ET AL.**

**CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, PETITIONER****v.****ROBERT FRANCIS, ET AL.**

**ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES AS
AMICUS CURIAE**

**ROBERT H. BORK,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.***



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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1181

RICHARD A. BATTERTON, ET AL., PETITIONERS

v.

ROBERT FRANCIS, ET AL.

No. 75-1182

CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, PETITIONER

v.

ROBERT FRANCIS, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES AS
AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTION PRESENTED

The United States will discuss the following question: Whether a regulation promulgated by the Secretary of Health, Education, and Welfare that allows but does not

require state programs of aid to dependent children of unemployed fathers to exclude from the definition of "unemployment" an absence from work that derives from "conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law" or from "participation in a labor dispute" is consistent with Section 407 of the Social Security Act, which defines "dependent child" to include a needy child "who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *."¹

STATEMENT

1. Title IV of the Social Security Act, 49 Stat. 627, as amended, 42 U.S.C. 601 *et seq.*, creates a cooperative federal-state program for aid to families with dependent children (AFDC). From the program's inception in 1935 until 1961, only those families with dependent children deprived of parental support or care on account of the death, continued absence, or physical or mental incapacity of a parent were eligible for AFDC assistance. See Section 406 of the Act, as amended, 42 U.S.C. 606. In 1961, however, Congress amended the Act to permit states, at their option, to assist families with dependent children who were deprived of parental support by reason of the unemployment of a parent (AFDC-E or AFDC-UF). Section 407 of the Act, as amended, 42 U.S.C. 607; see 75 Stat. 75.²

¹We do not discuss the further question whether, if that regulation is held invalid, individuals who have voluntarily left their employment without good cause, have been discharged for gross misconduct, or are out of work due to a work stoppage resulting from a labor dispute, are "unemployed" within the meaning of the Act. In our view, if the present regulation is invalid, it should be left to the Secretary to make those determinations in the first instance.

²The statute was later amended to refer to dependent children of unemployed "fathers" rather than of unemployed "parents." 81 Stat. 882.

As originally enacted, Section 407 authorized each participating state to define "unemployment." 75 Stat. 75. In 1968, however, Congress amended Section 407 to provide (1) that "dependent child" included "a needy child * * * who has been deprived of parental support * * * by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *" and (2) that, in order to qualify for federal assistance, a state plan must provide aid when, with limitations not relevant here, "such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days * * *." 42 U.S.C. 607(a) and (b); see 81 Stat. 882. Pursuant to that statute, the Secretary prescribed a uniform hours-worked standard of "unemployment." 34 Fed. Reg. 1146; see Jt. App. 37a.³

Maryland Social Services Administration Rule 200.X.A.2 denies assistance under the AFDC-UF program when the father is out of work by reason of conduct or circumstances that would render him ineligible for state unemployment insurance benefits. Under Maryland law (Ann. Code of Maryland, Art. 95A, §6 (1969 repl.)), unemployment benefits are not paid to, *inter alia*, (1) persons discharged from employment due to "gross misconduct," (2) persons out of work "due to a stoppage of work * * * which exists because of a labor dispute," and (3) persons "leaving work voluntarily without good cause" (Jt. App. 7a, 87a, 89a). Thus, in Maryland, otherwise eligible families with dependent children whose fathers fall within one of those three categories are denied AFDC-UF payments.⁴

³"Jt. App." refers to the joint appendix to the petitions for a writ of certiorari.

⁴The Secretary approved the Maryland AFDC-UF plan. See Section 402 of the Act, as amended, 42 U.S.C. (and Supp. V) 602.

2. This action was brought by fathers whose families had been denied AFDC-UF benefits because they were ineligible for state unemployment compensation—some had been discharged because of gross misconduct and others were out of work due to a labor stoppage resulting from a labor dispute. The plaintiffs filed a class action in the United States District Court for the District of Maryland, alleging that the state regulation violated the Constitution, the Act, and the Secretary's regulation prescribing a uniform hours-worked standard. A three-judge court rejected the plaintiffs' constitutional arguments but held the state regulation invalid under the Secretary's regulation (*Francis v. Davidson*, 340 F. Supp. 351 (*Francis I*); Jt. App. 21a, 24a, 28a-29a).⁵

The court enjoined the application of the Maryland regulation (Jt. App. 54a-55a), and the case was appealed to this Court (No. 71-1447). The Solicitor General, at the Court's invitation, filed a memorandum for the United States as *amicus curiae*; the memorandum took the position that summary affirmance would be appropriate in view of the fact that the Secretary was in the process of amending the regulation to clarify that the states are entitled to vary the coverage of their programs on the basis of factors other than the number of hours worked (Jt. App. 56a-60a). The Court summarily affirmed the judgment of the district court. 409 U.S. 904.

3. The Secretary then promulgated an amended regulation, 45 C.F.R. 233.100(a)(1) (Jt. App. 125a), that retained the hours-worked standard as a minimum test

⁵The United States Chamber of Commerce's motion to intervene as a party under Rule 24(a), Fed. R. Civ. P., was denied by the district court, but the Chamber was permitted to file a brief and to participate in oral argument as *amicus curiae* (Jt. App. 4a, n. 7). The Chamber's appeal to this Court from the denial of its motion was dismissed, 409 U.S. 907, as was the Chamber's appeal to the Fourth Circuit (Jt. App. 107a-113a).

that applicants in all states were required to meet in order to be eligible for benefits as "unemployed fathers," but added that "at the option of the State, [the] definition [of "unemployed father"] need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law."

On the basis of the Secretary's amended regulation, the state defendants requested the district court to dissolve the injunction entered in *Francis I*. The Chamber of Commerce of the United States was permitted to intervene (Jt. App. 61a-1 to 61a-2), and the court requested and received the views of the Secretary as *amicus curiae* (Jt. App. 61a-2 to 78a, 82a).

The district court refused to dissolve its prior injunction (*Francis v. Davidson*, 379 F. Supp. 78 (*Francis II*); Jt. App. 79a-85a). With respect to the class of fathers discharged for misconduct, the court held (Jt. App. 83a; emphasis in original) that the federal and state regulations were both invalid because "a father who is discharged for cause by his employer is unemployed * * * [and] [u]ntil the Congress amends the statute, no combination of federal and state regulations may provide [otherwise]." With respect to the class of fathers out of work because of a labor dispute, the court agreed that such individuals did not necessarily fall within the definition of "unemployed," but held (Jt. App. 85a) the Secretary's amended regulation invalid because it "contains no standards" as required by the 1968 amendment to the Act. The court concluded that "the Maryland * * * regulation excluding those unemployed because of labor disputes remains invalid" (Jt. App. 85a).

4. In a separate action filed after the decision in *Francis I*, the same Maryland regulation was challenged

by fathers not eligible for unemployment compensation under Maryland law because they had voluntarily left their jobs without good cause. The district court, following the reasoning in *Francis II* with respect to fathers discharged for misconduct, held that a father who voluntarily quits his job is "unemployed" within the meaning of the Act and that the state regulation therefore is invalid as applied (*Bethea v. Mason*, 384 F. Supp. 1274; Jt. App. 86a-98a).

5. The court of appeals consolidated the appeals from the district courts' decisions in *Francis II* and *Bethea* and affirmed *per curiam* (Jt. App. 100a-104a).

DISCUSSION

1. The central question in this case is whether the Secretary has authority to permit the states, if they so choose, to deny AFDC-UF benefits on the ground that the father's absence from work derives from "conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law." 45 C.F.R. 233.100 (a)(1). All respondents were denied AFDC-UF benefits on that ground. See p. 3, *supra*.

The courts below did not explicitly address that question. Instead, they inquired directly into whether the members of each class of respondents (except strikers; see p. 9, *infra*) were in fact "unemployed" within the meaning of Section 407 of the Social Security Act. This approach reveals a misunderstanding of the allocation of responsibility for defining "unemployed" or "unemployment" under the Act. Congress did not itself prescribe a definition of "unemployment." To the contrary, under the statutory scheme it is for the Secretary and, derivatively, for the states to give substantive content to that term in the first instance. The role of the courts is

to determine whether the Secretary's regulation is reasonable and therefore valid under the Act, not whether particular individuals or groups of individuals are in some abstract sense "unemployed." If the Secretary's regulation is found to be unreasonable, the primary responsibility for evolving suitable standards for determining unemployment should be left to him and should not be assumed by the courts. See note 1, *supra*.

The Secretary's regulation, however, is reasonable. "Unemployment," as used in the Act, is not self-defining. Congress originally provided that the term be "defined by the State[s]." 75 Stat. 75. Under that provision, the states were free to adopt definitions that met their individual priorities and perceptions of need. In 1968, Congress narrowed the states' authority to define "unemployment" by providing that such definitions must be "in accordance with standards prescribed by the Secretary." Section 407(a) of the Act. Congress authorized the Secretary to prescribe standards principally in order to eliminate existing discrepancies in the hours-worked criteria that had been adopted by the states as partial definitions of "unemployment." See *Macias v. Finch*, 324 F. Supp. 1252, 1256-1257 (N.D. Cal.), affirmed *sub nom. Macias v. Richardson*, 400 U.S. 913. Those discrepancies have been eliminated. 45 C.F.R. 233.100(a)(1). But Congress did not insist that otherwise a single, uniform national definition of "unemployment" would be required. To the contrary, by permitting the states to determine unemployment "in accordance with standards prescribed by the Secretary" rather than "as defined by the Secretary," Congress evidently contemplated that the Secretary would be free to prescribe standards that allow the states discretion to vary somewhat the coverage of their programs in response to their differing needs and policies. The language and history of the amendment fall

short of mandating a single, exclusive federal definition of "unemployment." Moreover, the AFDC-UF program is a cooperative federal-state venture that of necessity requires the accommodation of diverse, often conflicting, needs and interests, in which complete uniformity of implementation is not necessarily desirable. Thus the Secretary's regulation is not unreasonable merely because it leaves some measure of discretion to the states.

It is, moreover, consistent with the statutory purpose to permit eligibility for AFDC-UF benefits to turn upon whether the father is out of work for reasons that would render him ineligible for state unemployment compensation. Both in the statute and its legislative history, Congress recognized that the reason why an individual is not working may appropriately be considered in determining his comparative need for relief. See Section 407(b)(1) (B) of the Act; Jt. App. 43a-45a. State unemployment compensation programs reflect the same legislative understanding.

Furthermore, unemployment compensation serves substantially the same purpose as AFDC-UF relief, as Congress was aware. See Section 407(b)(2)(C)(ii) of the Act. Since eligibility for either form of relief in large part turns upon the fact of "unemployment," it is not unreasonable to give that term the same substantive content in each scheme. That is what the Secretary's regulation permits the states to do, and that is all that Maryland has done here.

2. The courts below should have had no occasion to reach the further question whether the Secretary has authority to allow the states discretion to deny AFDC-UF benefits when the father is out of work due to his "participation in a labor dispute." 45 C.F.R. 233.100(a)(1). Maryland's denial of AFDC-UF benefits to the respondent

strikers rested upon the fact that they were ineligible for unemployment compensation; that ineligibility in turn rested upon the fact that the strikes in question had resulted in a "stoppage of work." See p. 3, *supra*. Maryland apparently does not deny unemployment compensation and AFDC-UF benefits merely because of "participation in a labor dispute" without regard to work stoppage. Thus the denial of AFDC-UF benefits to the respondent strikers was based upon the "disqualification for unemployment compensation" clause, not the "participation in a labor dispute" clause, of the Secretary's regulation.

In any event, the courts below agreed that strikers could appropriately be treated as not "unemployed." Their quarrel with the regulation is that it delegates to the states the choice of either paying or not paying benefits to strikers with "no standards whatsoever" (Jt. App. 85a).⁶ But, as is indicated above (pp. 7-8, *supra*), such a

⁶In holding the regulation invalid for a failure to prescribe standards, the court of appeals left standing that portion of the regulation that establishes an hours-worked criterion of unemployment. Since Maryland's denial of benefits to strikers was inconsistent with that criterion, construed as an exclusive definition of "unemployment," the court concluded that the state's regulations were invalid. Petitioner Chamber of Commerce, in No. 75-1182, argues that, as a matter of statutory interpretation, strikers are not "unemployed," and that to require the payment of welfare benefits to them is incompatible with the system of collective bargaining fostered by the National Labor Relations Act. This issue, however, does not warrant review by this Court at this time. Cf. *Kimbell, Inc. v. Employment Security Commission of New Mexico*, No. 75-1452, appeal dismissed for want of a substantial federal question, October 4, 1976. If the Secretary's regulation is sustained, under Maryland's regulation AFDC-UF benefits would be denied to the strikers here; in that event this case would present no occasion for consideration of the question raised by the Chamber of Commerce. Furthermore, whether strikers may be treated as unemployed under the Social Security Act, and, if so, in what circumstances, are matters to be

delegation was within the contemplation of Congress in amending the Act.

3. The question of the validity of the Secretary's regulation is important. The decisions of the courts below cast doubt upon the extent of the Secretary's authority to permit existing variations in the program coverage of the various state AFDC-UF plans and thereby upon the validity of certain denials of benefits under several of those plans.⁷ Plenary review by this Court would obviate the need for case-by-case litigation with respect to each affected state plan.⁸

decided in the first instance by the Secretary and the states. See also note 1, *supra*. Accordingly, if the Secretary's present regulation with regard to strikers is held invalid due to a failure to prescribe standards, he should be permitted to reconsider the matter and to develop appropriate standards before this Court passes final judgment on the underlying question of statutory interpretation. Since the Secretary might conclude that benefits should not be paid to strikers under any circumstances, consideration in this litigation of the question raised by the Chamber of Commerce would be premature.

⁷For example, eight jurisdictions deny benefits when the father has been discharged for cause (California, Guam, Iowa, Kansas, Nebraska, New York, Pennsylvania and West Virginia) and eight deny benefits to the families of at least some categories of strikers (Guam, Iowa, Kansas, Kentucky, Minnesota, Nebraska, Oregon, and West Virginia).

⁸On August 8, 1975, the Secretary published a Notice of Proposed Rulemaking setting forth for public comment a proposed amendment to his regulation. 40 Fed. Reg. 33461; see Jt. App. 121a-124a. We are informed that the Secretary has no present intention of adopting the proposed amendment. Thus, contrary to respondents' suggestion (Br. in Opp. 3-4), and unlike the situation that pertained when this Court considered *Francis I*, the question presented here is not likely to be deprived of prospective significance by an imminent amendment to the Secretary's regulation.

CONCLUSION

The petition for a writ of certiorari in No. 75-1181 should be granted. The petition for a writ of certiorari in No. 75-1182 should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

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MICHAEL RODAK, JR., CLERK

No. 75-1182

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, *Petitioner*,

v.

ROBERT FRANCIS, ET AL., *Respondent*.

**REPLY OF CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA TO MEMORANDUM
FOR THE UNITED STATES AS AMICUS CURIAE**

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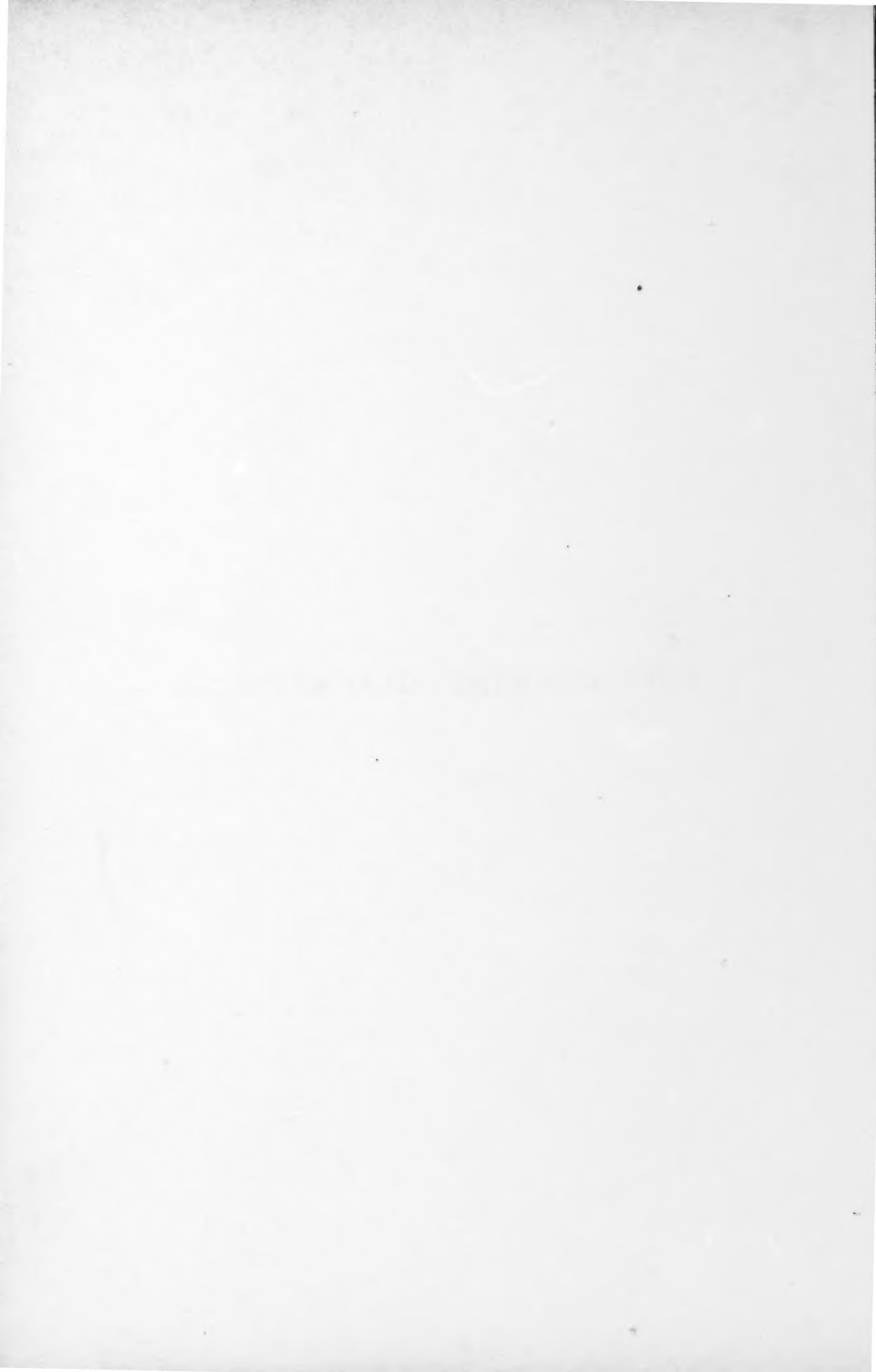


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On May 19, 1976 the Court invited the Solicitor General to express the views of the United States in this case and No. 75-1181.¹ The Solicitor's response, filed on or about October 22, 1976 requires the following reply.

1. The Solicitor General (Mem. 11) invites the Court to accept the *Batterton* petition but deny the Chamber's. Acceptance of this approach to these petitions will preclude review of the very issue raised by the Chamber which must be confronted *before* the merits of *Batterton* can be reached, namely, whether the Congress in creating the federal-state welfare sys-

¹ *Richard A. Batterton, et al. v. Robert Francis, et al.*

tem and the federal labor scheme intended and authorized the HEW Secretary to prescribe regulations granting participating states the option to award federal welfare money to persons whose "unemployment" arises solely from their decision to temporarily withhold their services from their employer and strike in support of their collective bargaining demands.

To be sure Congress in 1968 delegated to the HEW Secretary the authority to define "unemployment" in order to standardize the diverse and conflicting definitions promulgated by the participating states. H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967). But it can not be properly assumed as the Solicitor General does (Mem. 7-10) that the validity of the Secretary's regulations can be determined, at least so far as striking employees are concerned, solely by reference to whether the regulations are a "reasonable" definition of unemployment. Before this question can be reached, a clear delegation of legislative power from Congress to the Executive Branch authorizing the promulgation of standards covering striking employees must be established. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 428-29 (1935). These standards may have significance in other circumstances, but whether Congress granted the Secretary any authority to apply them to striking employees is a question which must be first decided in terms of legislative intent. *Burns v. Alcala*, 420 U.S. 575, 580-85 (1975); cf. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93-5 (1973); *Big Rivers Elec. Corp. v. E.P.A.*, 523 F.2d 16, 19 (6th Cir. 1975), *cert. denied*, — U.S. —, 96 S.Ct. 1663 (1976).

The necessity for consideration of this preliminary question of Congressional intent as reflected in federal labor and welfare laws is not only compelled by cus-

tomary legal analysis generally and by the specific approach adopted in *Burns v. Alcala*, *supra*, to welfare eligibility questions, but also by the Court's ruling in *Super Tire Engin'r Co. v. McCorkle*, 416 U.S. 115 (1974). In that case the State of New Jersey paid federal welfare benefits under the unemployed parent program² to striking employees whose "unemployment" resulted solely from their decision to strike their employer in an effort to obtain increased wages and benefits. These payments were challenged as contrary to and inconsistent with federal labor and welfare policy. A divided panel of the court of appeals held this cause of action moot because the strike concluded prior to the time the District Court entered its order dismissing the case on other grounds.³ On a writ of certiorari, the Court reversed the judgment of the Third Circuit, reinstated the cause of action, and, significantly, remanded the case for consideration of one legal question (416 U.S. at 124):

whether Congress, explicitly or implicitly, has ruled out [welfare assistance for striking workers] in its calculus of laws regulating labor-management disputes.

The necessity for going beyond the validity of Secretary's regulations in this case is further demonstrated by the legal analysis contained in *Macias v. Finch*, 324 F.Supp. 1252 (N.D. Cal.) (three judge court), *aff'd*, 400 U.S. 913 (1970) cited by the Solicitor General (Mem. 7).⁴ There, two fathers, one working as a security official and the other as a farm worker,

² 42 U.S.C. § 607.

³ 469 F.2d 911 (3d Cir. 1972) (J. Gibbons, dissenting).

⁴ This case is cited at p. 17 of the Petition as supporting the Chamber's petition for a writ of certiorari to the Fourth Circuit.

challenged *inter alia* the Secretary's hours worked definition of unemployment as unconstitutional because this standard supplanted the state need requirements otherwise satisfied by the fathers. The district court upheld the regulations not on their own terms but by specific reference to (324 F.Supp. at 1257) congressional intent as to the scope of the unemployed parent program and (324 F.Supp. at 1260 nos. 9 and 10) to congressional policy for these fully employed fathers as reflected in the Labor-Management Relations Act⁵ and the Fair Labor Standards Act.⁶ Writing for the unanimous panel, Circuit Judge Duniway stated (324 F.Supp. at 1260-61):

Here the congressional retention, or creation . . . of this particular lacuna in AFDC coverage may be explained by pointing to congressional efforts to maintain adequate wages for employed people through such devices as minimum wage laws (footnote omitted) and collective bargaining rights (footnote omitted). These and similar efforts on behalf of employed people provide a rational basis for exempting employed fathers from the coverage of the [unemployed parent program].

We have contended from the outset in this case that striking fathers are also fully employed, as thus outside the reach of the unemployed parent program because, when one looks to federal labor policy as directed by the two decisions discussed above, one finds that Congress in the 1935 Wagner Act defined a striker to be an employee of the struck employer and to retain continuing and total reinstatement rights (absent picket line or other misconduct) at anytime during or at

⁵ 29 U.S.C. §§ 141 *et seq.*

⁶ 29 U.S.C. §§ 201 *et seq.*

the conclusion of the strike. See also 29 U.S.C. § 159 (c)(3).

The Solicitor General (Mem. 9) appears to agree with us that striking employees are not "unemployed," but this apparent concession does not obviate the task of reviewing congressional welfare and labor policy to resolve the legal question posed in *Super Tire v. McCorkle*, *supra*, ruled on by the courts below and presented by the Chamber's petition for certiorari in the instant case. We, therefore, respectfully insist these petitions can not properly be separated.

2. The Solicitor General maintains (Mem. 2 n.1) that if the HEW promulgated regulations are *invalid* resolution of the issues posed by the Chamber's petition should be left to the HEW Secretary "in the first instance." The current HEW Secretary has publicly stated that he is awaiting judicial determination of this and other cases before attempting to prescribe any "new" standards or definitions of "unemployment." See pp. 2a-6a of Supplement Jt. App. attached to Petitioner's Reply to Respondent's Opposition to Petition For Writ of Certiorari.

The HEW Secretary has in the past, in exercising his delegated authority to define unemployment, ignored congressional welfare and labor policy which affirmatively directs him to preclude striking employees from the unemployed parent program. In issuing the very amendments to 45 C.F.R. 233.100(a) (1) invalidated in this case, the then HEW Secretary Weinberger specifically stated that he was neither speaking on behalf of Congress nor responding to a specific congressional mandate. 38 Fed. 18549 (1973).

The Solicitor's apparent agreement with our position that striking employees are not "unemployed"

within the meaning of the unemployed parent program and thus outside of the class of the congressional intended recipients of this form of federal welfare suggests that a new appreciation of congressional policy may be anticipated. But this possibility would not be beyond legal challenge unless the Court accepts the opportunity presented by the Chamber's petition to conduct a comprehensive review of the separate federal legislative schemes established for the wage earning member of society like Mr. Francis (see *Anchor Motor Freight v. Hines*, 424 U.S. 554, 563 (1976)), and the worker whose loss of work results from the operation of economic forces far beyond his (or societies) control. Cf. *Carleson v. Remillard*, 406 U.S. 598, 603 (1962). The Secretary's public statements referred to above, reflect a willingness to await delineation of judicial guidelines defining the scope of his legislatively delegated discretion to define unemployment, and there is no reason now for the Court to decline to give this guidance because the Chamber's petitioner poses and the courts below ruled upon, the relevant statutory language in the Labor-Management Relations Act and the Social Security Act and the surrounding legislative materials.

3. The Solicitor General further contends (Mem. 9 n.6) that dismissal of the Chamber's petition is warranted because if the Secretary's regulations are declared *valid* the State of Maryland may properly deny eligibility to striking employees, and thus this portion of the case is moot or no longer a viable "case or controversy." However, such a ruling would *ipso facto* reinstate the *optional* aspect of the HEW regulations which, we contend, do not accurately reflect controlling federal welfare and labor policy. More-

over if, as the Solicitor General states (Mem. 9), the State of Maryland determines federal welfare eligibility for striking employees by reference to whether or not the strike shuts down the employer's productive capacity, then Maryland does *not* unwaveringly proscribe federal welfare benefits to striking employees like Mr. Francis. Thus, in the future Maryland may enroll striking employees in this federal welfare program, and all Maryland employers whose operations fall within the jurisdictional standards of the National Labor Relations Board are subjected to the *continuing* burden that the ability of their employees to support and indeed sustain a strike may be significantly augmented by federal tax monies. We submit this situation represents sufficient injury to sustain the Chamber's petition here.

4. Finally, the Solicitor General states (Mem. 9 n.6) that the legislative intent questions presented by the Chamber do "not warrant review by this Court at this time." This conclusion is devoid of supporting reasoning except for a "cf." reference to *Kimbell, Inc. v. Employment Security Comm'n of New Mexico* (U.S. No. 75-1452), *appeal dismissed* "for want of a substantial federal question" (October 4, 1976). That appeal, which involved only the payment of *unemployment compensation* to employees locked out by their employers during a collective bargaining dispute, was dismissed because, as this Court's October 4, 1976 order indicates, no federal question was decided by the highest New Mexico court. And the Supreme Court has consistently adhered to the jurisdictional principle that it can not review state court judgments resting on non-federal grounds. *E.g., Herb. v. Pitcain*, 324 U.S. 117, 128 (1944). In the instant case, however, as the Solicitor

agrees, the lower courts reached and decided the federal labor and welfare questions raised here by the Chamber; so the citation to *Kimbell* provides no support for the government's *ipse dixit* that review is not warranted at this time. In any event the Court itself has already recognized the significance of the welfare question posed by the Chamber's instant petition in *Super Tire Engin'r Co. v. McCorkle*, *supra*. There, the Court stated (416 U.S. at 127): "The judiciary must not close the door to the resolution of the important questions these concrete disputes present." Indeed even earlier in *I.T.T. v. Minter*, 435 F.2d 909 (1st Cir.), *cert. denied*, 402 U.S. 933, *rehearing denied*, 404 U.S. 874 (1971), nineteen states asked the Court to take that case so the same issue posed here by the Chamber's petition could be finally resolved.

Review is even more timely and appropriate now than it was when *Super Tire v. McCorkle*, *supra*, was remanded for further proceedings in December 1974. On October 4, 1976 the Court noted probable jurisdiction in *Ohio Bureau of Employment Services, et al. v. Hodory* (No. 75-1707). The question for decision is whether state denial of unemployment compensation to employees who are laid off as a result of a collective bargaining dispute at another facility operated by their employer is constitutional. Review of that issue may well necessitate consideration of whether unemployment compensation may be granted or denied to employees immediately involved in a labor dispute because the lower court based its decision in part upon the reasoning that the denial of such benefits to this class of employees would be constitutional. Thus *Hodory* and the instant case present a singular opportunity to consider in tandem if states may pay welfare

or unemployment compensation to employees participating in or affected by a labor dispute. Separate or piecemeal resolution of these important eligibility questions will prolong litigation because the states may continue or create eligibility for employees in which-ever program is unaffected by the Court's judgment. The similarity between the eligibility issues posed in *Hodory* and that raised by the Chamber's petition here is underscored by the Solicitor General's Memorandum (p. 8):

unemployment compensation serves substantially the same purpose as AFDC-UF relief, as Congress was aware. See Section 407 (G)(2)(C)(ii) of the [Social Security] Act.¹⁷ Since eligibility for either form of relief in large part turns upon the fact of "unemployment," it is not unreasonable to give that term the same substantive content in each scheme.

We agree these programs have a "similar purpose", but further assert that strikers' eligibility for either form of public subsidy must be resolved by looking to the definition of a striker as an employee in 29 U.S.C. § 152(3) of the National Labor Relations Act. Thus, comprehensive review of both forms of subsidies to striking employees can only occur by accepting the Chamber's petition here because unemployment compensation eligibility can, unlike the instant case, be determined solely by reference to the preemption doctrine. See, e.g., *Hawaiian Tele. Co. v. State of Hawaii, Dept. of Labor*, 405 F.Supp. 275 (D.Haw. 1976), *appeals docketed* Nos. 76-1584, 2056 (9th Cir. 1976).

¹⁷ This statutory citation, which should read § 407(b)(2)(c)(ii), requires participating states to deny AFDC-UF welfare for "any week" unemployment compensation is paid to the father of a dependent child.

The question of whether striking employees are "unemployed" and thus eligible for federal welfare monies can not be answered by reference to the HEW regulations alone because the validity of any regulations which grant optional or mandatory eligibility for employees engaged in a labor dispute must be resolved, as the Court stated in *Super Tire v. McCorkle, supra*, by reference to federal labor laws. Thus, contrary to the statement of the Solicitor General (Mem. 10), plenary review will obviate further case-by-case litigation of these inextricably intertwined issues only if the Chamber's petition is also accepted by the Court.

CONCLUSION

Comprehensive plenary review of the decisions of the courts below also requires granting the petition for a writ of certiorari in the instant case.

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